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BEFORE THE HEARING OFFICER FOR THE

IDAHO DEPARTMENT OF EDUCATION

IN THE MATTER OF A REQUEST FOR A DUE PROCESS HEARING: TWIN FALLS SCHOOL DISTRICT NO.411	)	Case No. H-07-05-03 **COVER PAGE TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

This is the cover page of the Findings of Fact, Conclusions of Law and Order in this matter. The parents are [redacted]. The child is [redacted], born [redacted]. The School District is Twin Falls School District No. 411.

I. STATEMENT OF THE CASE

It would be difficult to envision an IDEA hearing that would have a more complicated procedural history than the case before this hearing officer. The formal hearing process was initiated by the District on November 3, 2006 when the District filed a Notice of Request for Administrative Hearing (hereinafter referred to as the "IEE complaint") which challenged the Parent's prior request for an independent education evaluation. On or about November 28, 2006 the Student filed an answer to the District's request for hearing along with a "counterclaim" and a "data request." The District objected to the timeliness of the Answer and sought dismissal of the counterclaim. After extensive briefing from the parties, the hearing officer issued a comprehensive decision which dismissed the Student's counterclaim. (The hearing officer did not agree that the counterclaim was not timely filed, although more than ten (10) days had passed, because the hearing officer had verbally granted an extension of time during a telephone conference prior to the Student's filing of an answer and counterclaim.) That decision was issued without prejudice on March 20, 2007.

Thereafter, on April 17, 2007, the Student filed a Complaint and Request for Administrative Hearing (hereinafter referred to as the "FAPE complaint"). That Complaint was assigned to this hearing officer. The District's answer was filed on or about May 14, 2007. Among other issues, the District's answer set forth that some of the Student's claims were outside the two (2) year statute of limitations and the Student's complaint set forth allegations beyond the hearing officer's jurisdiction including, but not limited to Section 504 the Rehabilitation Act of 1973 (Section 504); The Americans with Disabilities Act (ADA); the Commission on Human Rights of the Idaho Code; the Idaho Education of Exceptional Children Act; and the Family Educational Rights and Privacy Act (FERPA). In the IEE case, the Student

thereafter filed a Motion for Consolidation of Administrative Hearings. Ultimately, the motion for consolidation was heard by this hearing officer and the motion for consolidation was not opposed by the District. As a result, the IEE complaint (case file No. H-06-11-06) was consolidated with the FAPE complaint, Case No. H-07-05-03. See Order of Consolidation dated June 14, 2007.

This matter proceeded to hearing on June 26, 2007 and continued until the close of evidence on June 28, 2007. Numerous pretrial motions had been filed by the parties, all of which were ruled on in advance of the hearing with the exception of the District's Motion to Dismiss Claims Beyond the Statute of Limitations. See Order on Pretrial Motions dated June 25, 2007.

II. MOTION TO DISMISS ALL CLAIMS BEYOND STATUTE OF LIMITATIONS

As the District points out, the Student's complaint alleges "failures of the school District 'as early as February 2004.'" Pursuant to the IDEA,

> A parent or agency **must request** an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the state has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by state law. 20 U.S.C. § 1415(f)(c)(3)(C); 34 CFR Section 300.511(e). (Emphasis supplied.)

There are specific exceptions to the two year statute of limitations. See 20 U.S.C. § 1415(f)(3)(D); 34 CFR Section 300.511(f). Although the Student contends the exceptions to the statute of limitations apply, there would not appear to be a factual basis to support a finding that such exceptions apply. Further, neither party suggests the state has "an explicit time limitation" other than the two year statute of limitations set forth in the IDEA. Thus, the two year statute of limitations does apply to this case.

During the course of the hearing, it was not contested that an IEP was in place for the 2005– 2006 school year. That IEP was developed and ultimately approved by all parties on September 8, 2005. (Both Parents of Student testified to their approval of this IEP which, at the time of hearing, was the "stay-put" IEP.) The FAPE complaint for due process is entirely premised on events that occurred after the promulgation of the 2005 IEP for the Student. As a result, this hearing officer determines that the Student has not raised any issues which would implicate the statute of limitations. The hearing officer's decision below will consider any complaint for denial of FAPE after promulgation of that IEP. To the extent the Student asserts an IDEA- related claim which arose beyond the two (2) year statue of limitations, the District's motion to dismiss such claims for being beyond the statute of limitations is **GRANTED.**

III. MOTION TO SUPPLEMENT RECORD

As demonstrated by the hearing officer's Minute Entry and Order dated July 6, 2007, the official record of this case is extensive and contains numerous exhibits offered by both parties. However, at the conclusion of the evidence, the hearing officer expressed concern to the parties about the lack of appropriate evidence on the cost of the independent evaluations obtained by the Student and the tuition cost of the Student's private school placement. Thereafter, on July 16, 2007, the Student moved to supplement the administrative record with proposed Exhibit A, B and C. The District has objected to the Student's motion.

Without restating the arguments of the parties, this hearing officer recognizes I have wide latitude concerning the submission and admission of evidence for purposes of an administrative hearing. The Student's position appears to be that the additional exhibits are offered at the suggestion of the hearing officer and that an analogous section of the IDEA, 20 U.S.C. § 1415(i)(2)(C)(iii) suggests that additional evidence may be submitted at any time. The District

contends that that section of the IDEA developed three (3) basic principles. First, additional evidence must be relevant. Secondly, on accepting additional evidence, the trial court must not allow an appeal to become a trial *de novo*. Third, there must be a specific need for the supplemental evidence. By admission of the proffered exhibits, this hearing officer does not believe the hearing is being unduly expanded in violation of the second principle stated above. Also, since it was the hearing officer who suggested the need for additional evidence, the third principle has been met and the Student has adequately demonstrated the need for supplemental evidence. The crux of the issue before the hearing officer on this motion is whether or not the evidence submitted is relevant.

The District does not contend that the proffered exhibits are not authentic or genuine. The District does contend that the invoice from Idaho Elks Rehab (proffered Exhibit A) is not complete and lacks an adequate foundation. This hearing officer agrees. Exhibit A appears to be an invoice from the Idaho Elks Rehab which shows "payments" and "adjustments". Further, the affidavit of the Mother attached in support of the motion to supplement the record acknowledges that further payments from collateral sources may still occur. As to proffered Exhibit A, the hearing officer cannot find that this exhibit will have sufficient relevancy to be helpful in determination of the issues, and the admission of Exhibit "A" is **DENIED.**

Exhibit B appears to be a statement from the Student's private school placement dated July 9, 2007, nearly two weeks after the hearing was concluded. Exhibit C is a two (2) page exhibit which appears to be copies of checks showing payments made to the private school which correspond to Exhibit B. The second page appears to be a summary of the first page of the exhibit. These two (2) exhibits do appear to aid the hearing officer in ascertaining the cost to the

Parents of the private school placement. Thus, Exhibits B and C will be **ADMITTED** to the official record of hearing of this case.

IV. ISSUES PRESENTED

A. Should the District be required to reimburse Student for the independent evaluation obtained by the Parents?

B. Was Student's proposed placement in the special education classroom for the 2006-2007 school year the least restrictive environment?

C. Did the Student receive FAPE?

V. FINDINGS OF FACT

1. Student was born on [redacted] and resides within the geographical boundaries of the District. The student is scheduled to attend the third grade in September, 2007.

2. The Student has multiple disabilities which entitle the Student to special education services meeting the criteria of a free and appropriate public education (FAPE).

3. The District and Parents, on behalf of the Student, agreed to the terms of an IEP on or about September 8, 2005. (Respondent's Exhibit 3) This IEP covered the education plan and services to be provided to the Student for the 2005-2006 school year. This IEP became the "stay put" IEP for the 2006-2007 school year. (Some of the data on the IEP appears to be incorrect. For example, it purports to be an IEP for the Student's 2nd grade year, but the evidence at hearing reflected that the Student was in the 1st grade in 2005-2006. Also, the Behavior Intervention Plan contains a date some nine (9) months prior to the date of the IEP.)

4. The IEP required the District to provide the Student with seven (7) hours and thirty (30) minutes of group developmental therapy per week, two (2) hours and thirty (30)

minutes of individual developmental therapy per week and eight (8) hours per week of group developmental therapy. The Special Ed Teacher and/or a paraeducator provided these services.

5. The following related services were to be provided to the Student:

a) [redacted]

b) [redacted]

c) [redacted]

d) Specially arranged transportation through [redacted] once a day.

6. The IEP required the Student's progress to be reported to the Parents on a quarterly basis and at parent-teacher conferences. (Ex. 3).

7. According to the "Placement Determination" section, the Student was not to be in the general education classroom but it provided, as an annual goal, that the Student would begin the year with thirty (30) minutes of inclusion to be increased as the year progressed to one hundred and forty-five (145) minutes. (Ex. 3, p.6.)

8. The Student's time in the general education classroom for 2005-2006 reached the stated goal of one hundred and forty-five (145) minutes.

9. The Student, due to fatigue issues, could only spend [redacted] hours a day at school or [redacted] hours per week. A regular school day is six (6) and three-quarters (¾) hours. (Ex. 3, Transition Plan.)

10. The District did not, at any time during the 2005-2006 school year, inform the Parents that the Student was not progressing according to the objectives set forth in the IEP for increased inclusion time.

11. The IEP requires the Student's placement in a school that contains an Extended Resource Classroom (ERC). The Student's neighborhood school does not have an ERC and he attended Harrison Elementary for the 2005-2006 school year, which had an ERC. The Student will be required to attend yet another school, not his neighborhood school, in the upcoming year if he is placed in a 3rd grade ERC. (Testimony of Director of Support Services.)

12. The Student was evaluated for special services in January, 2005. The results of that evaluation were not provided as part of this record.

13. The Parents did not object to the January, 2005 evaluation until October 25, 2006, nor did the Student request an IEE be performed at public expense until October 25, 2006. (Ex. 140.)

14. Shortly thereafter, the District denied the Parent's request and filed a due process complaint. See CFR § 300.502(b)(2)(i). That due process complaint was silent on whether the District believed its January, 2005 evaluation was appropriate. The District, did, however, consent to provide, at public expense, a neuropsychological evaluation of the Student. (Testimony of Director of Support Services.)

15. The District was not given an opportunity to conduct its own evaluation when the Student requested an IEE. The District concedes its 2005 evaluation lacked a neuropsychological component.

16. Since no later than August of 2005, the Student has sought placement in a general classroom setting in the neighborhood school.

17. The Student's IEP contains a transition plan that states, *inter alia:*

a) The goal of the Student's parents is for the Student to be in a fully inclusive general education setting "with resource pull-out for academics."

b) The Student would be prepared for full inclusion if he met the stated criteria.

c) The Student's progress "will be discussed and decided by the IEP team on a quarterly basis until … that criteria has been met." (Emphasis supplied.)

18. The IEP team and the District failed to provide adequate progress reports so the Parents, or others, could determine if the stated criteria had been met.

19. The Student did not begin attending school for the 2006-2007 school year until [redacted].

20. The Student was removed from public school on [redacted] and was unilaterally placed in a private school setting. Although the student's Parents and the District did not agree on an amended IEP for the 2006-2007 year, the District did agree to provide 1:1 IBI services for the Student. See Ex's 142 and 143.

21. The private school setting was a self-contained setting of approximately fifteen (15) age-appropriate peers. It is not clear if any of the other students in the Student's private school classroom were receiving special education services but it is presumed none were.

22. The Student flourished and improved in the private school placement, showing marked improvements in behavior management and academic performance. The disruption caused by the Student's behavior to other students was minimal. (Testimony of Private School Teacher.)

23. The Student paid $1,901.25 for tuition and related expenses at the private school. See Ex's. B & C.

24. The Parents undertook extensive efforts to obtain a neighborhood, general education setting for the Student. See Ex. 144. The efforts included attending school with the

Student on a daily basis and acting as a behavior aide and/or "coach" for behavior management, providing data on the Student's progress, providing information, etc.

25. The parties conducted a facilitated IEP meeting without reaching a consensus on an IEP.

VI. CONCLUSIONS OF LAW

1. A child with a disability has the right to a free appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1)(A). FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meets the state's education standards and that conform to the student's IEP. 20 U.S.C. § 1401(9). Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(29).

2. Before conducting an assessment, the District is required to secure parental consent. 20 U.S.C. § 1414(a)(1)(C)(i). However, the District may proceed with an assessment by seeking a determination through a due process hearing that such assessment is necessary. 20 U.S.C. § 1414(a)(1)(C)(ii).

3. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its evaluation is appropriate or insure that an independent evaluation is provided at public expense. 34 CFR § 300.502(b)(2)(i – ii). While a parent is entitled to only one (1) independent educational evaluation at public expense each time a public agency performs an evaluation with which the parent disagrees, there is no time limit in which the IEE must be requested. 34 CFR § 300.502(b)(5). The burden of persuasion lies with the party seeking relief at an administrative hearing. Schaffer v. Weast, 546 U.S. 49, 53, 126 S. Ct. 528, 163 L.Ed. 2.d

387 (2005). In this case, the District has the burden of persuasion on its complaint in which it seeks to show that its prior evaluation was appropriate. 34 CFR § 300.502(b)(2)(i).

4. Unless the IEP of a child with a disability requires some other arrangement, the child should receive his educational services in the school he or she would attend if non-disabled. 34 CFR § 300.116(c). The child's placement should be as close as possible to the child's home. 34 CFR § 300.116(b)(3).

5. Special classes for children with disabilities, or removal from the general education classroom, is permitted only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2).

6. Four (4) factors should be considered in evaluating whether the present placement of a child is the least restrictive environment (LRE). Those four (4) factors are:

(1) The educational benefits of placement full-time in a regular class;

(2) The non-academic benefits of such placement;

(3) The possible negative effects of the inclusion of the child on the education of the teacher and the other students in the class; and

(4) The cost of mainstreaming the student.

Sacramento City School District v. Rachael H, 14 F.3d 1398 (9th Cir. 1994).

7. The FAPE requirement of the IDEA requires tailoring the unique needs of the handicapped child to an educational program by means of an IEP. See Board of Education v. Rowley, 458 U.S. 176, 181 (1992). However, the statute contains no standard prescribing the level of education to be accorded handicapped children. *Id* at 189. Consequently, FAPE is provided when personalized educational services are provided. *Id* at 197. Accordingly, the

IDEA "generates no additional requirement that the services so provided be sufficient to maximize each child's potential." *Id* at 198.

VII. DISCUSSION

A. Where the District failed to present any credible evidence that the January, 2005 public evaluation was appropriate and, indeed, conceded that its prior evaluation contained no neuropsychological component, the District has failed to meet its burden that its evaluation was appropriate and the District should be required to provide the Student an IEE at public expense.

The School Psychologist testified for the District. He is a certified psychologist and testified he was familiar with the scope of the January, 2005 evaluation conducted for the Student. He testified he was requested to do some psychometric testing of the Student, including IQ tests. He testified further that he was not able to complete the testing because of the inability of the Student to follow directions. He also testified that, since the 2005 exam, he has learned that the Student has some visual impairment which may or may not have affected the Student's ability to test.

Likewise, the Student was recently evaluated by Dr. Dennis Woody. Dr. Woody testified he was asked to perform a neuropsychological evaluation of the Student. Dr. Woody testified that, while other personnel at the Elk's Rehabilitation Clinic were asked to make recommendations for the Student's educational placement, and that he participated in a group discussion of that effort, he was never asked to perform an IEE. He also testified he was unable to complete his testing of the Student because of a "pronounced fatigue effect." As a result, no formal scores or diagnoses were achieved by Dr. Woody's testing.

The Student requested an IEE on October 25, 2006. While that was roughly one (1) year and ten (10) months after the prior evaluation conducted by the school, there is no time requirement by which the student must object to the District's evaluation. See 34 CRF § 300.502(b)(5). Indeed, the Student and his Parents are entitled to object to the District's evaluation at any point at which that evaluation becomes obsolete and can no longer serve as the basis for educational placement and programming decisions.

The Student is also not required to state the basis for the objection to the public evaluation. The District may inquire of the Student and his Parents and seek an explanation for the objection to the public evaluation, but the failure to provide an explanation does not alter the procedural requirements of IDEA. See 34 CFR § 300.502(b)(4).

The prior evaluation may have served its purpose well for the first year or more of its existence. Indeed, the need for more extensive or new evaluations could be expected to arise for students such as the Student here, who has multiple disabilities which effect his academic performance. The school has conceded that it learned of a visual impairment which was not revealed by the initial evaluation. (Testimony of School Psychologist.) It also conceded that a neuropsychological evaluation would be appropriate. (Director of Support Services.) Consequently, the District has failed to carry its burden that the prior evaluation of January, 2005 was appropriate for continued assessment and review or to assist with the preparation of a new IEP for the Student.

The Student sought out and received a multifaceted evaluation at the Elk's Rehabilitation Clinic in Boise. See Ex's 18, 19, 20, 21 and 24. With the exception of Dr. Woody's futile attempt to develop some objective findings as to the neuropsychological status of the Student, the findings of this evaluation revealed little, if anything, that was new to the District or the

Parents. The District correctly contends that its responsibility to pay for IEE's is based, in part, on its right to set the criteria for those evaluators and evaluations. Schaffer, *id.* See 34 CFR § 300.52(b)(2)(i) and (e). While the IEE's must meet the District's criteria as established for its own evaluations, the District has the burden of establishing that the IEE did not meet the criteria. Here, there was no evidence presented as to the applicable criteria that the IEE was required to meet nor were there any specific allegations as to the portions of the Parent's evaluation that failed to meet the agency criteria. Consequently, it is determined that the Parent's IEE, obtained over the course of several months at the Elk's Rehabilitation Hospital in Boise, Idaho, was a qualified IEE and subject to reimbursement.

The Student attempted to supplement the record to provide credible evidence as to the cost of reimbursement for the IEE. The Student attempted to introduce Exhibit "A", as discussed above. The Student contends that Exhibit "A", which was not admitted into the administrative record, would show that the amount of restitution should be set at $1,088.87. For the reasons discussed above in denying Exhibit "A's" admission, the hearing officer **DENIES** the Student's motion for reimbursement in that amount or any other amount due to the lack of credible evidence of the cost of the IEE borne by the Parents.

The Student argues that it is difficult, if not impossible, to obtain, prior to the administrative hearing, all of the necessary information to show the appropriate measure of reimbursement. While that may be true in the typical case, the request for this evaluation was made more than seven (7) months prior to the administrative hearing. Testimony established that some of the evaluations were ongoing and conducted until just prior to the administrative hearing. This hearing officer is not persuaded that appropriate evidence concerning the amount of reimbursement for the IEE could not have been provided.

The Student further argues that, in the "typical" case, reimbursement is ordered without the order specifying the amount. While it is apparent that this has occurred in the past, it is also apparent that other hearing officers and courts have requested that the amount of reimbursement be proved up by the parties seeking reimbursement. See e.g. Roxanne, J., v. Nevada County, 46 IDELR 280 (Nov. 28, 2006); North Plainfield Board of Ed., 42 IDELR 217 (2005).

B. While no real efforts have been made at placing the Student into a full inclusion classroom in his neighborhood school, and where the District failed to implement the appropriate assessments and evaluations required under the Student's transition plan continued placement in a special classroom is not the least restrictive environment for the Student.

The testimony of the Director of Support Services indicated that, if the Student were to continue in a special education classroom, that classroom would be provided at Oregon Trail Elementary School in the coming year, and not Harrison Elementary, where the Student has been assigned for the prior two (2) school years. If the Student were to be placed full-time in a general education classroom, he would presumable be placed in the neighborhood elementary school.

For the 2005-2006 school year, the Parents of the Student agreed to an IEP that included a long term transition plan, similar to that suggested by Dr. Woody, for the Student to be transitioned into a full inclusion general education setting. That transition plan included specifically that "assessment of progress will be discussed and decided by the IEP team on a quarterly basis until it has been decided that criteria has been met." Virtually all of the evaluation measures provided in the Student's goals and objectives include periodic measurements by the special education teacher and/or paraeducator or by other service providers,

such as the physical therapist. However, no progress reports were provided to the hearing officer, nor was there any testimony of reports concerning the transition plan. It is clear that the transition plan, which provided that the Student would be "prepared for full inclusion in a general education setting at his neighborhood school with resource pull-out of academics" was never seriously pursued by the District. The testimony established that the Student's Parents agreed to a placement for the 2005-2006 school year for the Student in a special education classroom which was not available in the Student's neighborhood school. It is also clear that the Parents did so in reliance on a transition plan which Parents insisted be included in the IEP and which provided for full inclusion.

The School Psychologist testified that the special education classrooms are for "individuals who can't be in a regular classrooms because of alternative needs, such as speech therapy, personal hygiene issues, and typically need an alternative curriculum that is typically not taught in regular classrooms." This notion is clearly in conflict with federal law. Children with disabilities are to be educated with their non-disabled peers to the maximum extent appropriate. See 34 CFR § 300.114(a)(2). The special classes are to be used only if the nature or severity of the disability is such that the same services cannot be performed in a general education classroom with the use of supplementary aids and services. *Id.* That is precisely what the School Psychologist believes should be done, i.e. that the Student should be put into a special education classroom solely because of a disability and a need for supplementary aids and services. See 34 CFR § 300.116(e). Essentially, the School Psychologist's testimony amounts to a belief that the Student's multiple disabilities preclude the Student from benefiting from education in a regular classroom. The Student's Special Education Teacher testified that the Student needed a special education classroom because of his physical needs and his cognitive

impairment. Again, District personnel are asserting the need for special education classrooms based solely on the Student's disabilities, which is clearly in violation of federal law. The special education director for the District testified that the Student had "difficulty" adjusting to the general education classroom. It goes without saying that even non-disabled children of that age may have "difficulty" adjusting to a general education classroom. According to the Director of Support Services, the general education teacher had concerns that the Student was very distracting to other students. The Director of Support Services testified that there were virtually no progress reports of the Student's progress for the 2005-2006 report and that she replied upon "anecdotal" reports of teachers, but she could not recall what that data was. The Director of Support Services further testified that the District proposed an IEP for the 2006-2007 year that included a new transition plan to transition the student into the neighborhood school. However, there was no such transition plan in the proposed IEP. See Ex. 134.

The District's Consulting Teacher also testified that an ERC setting was best for the Student. The Consulting Teacher believed it was hard to meet the Student's needs when the teachers were instructing other students. The Consulting Teacher testified she observed the Student's behavior in the special education classroom and opined that the behavior would be disruptive in a general education classroom. The District has contended that a major obstacle to placement in a general education classroom is the Student's behavior. The District points to the disruption caused to other students in the class, as well as the teacher. See Post Hearing Memorandum of the District, p. 10. By inference, the District seems to be arguing that such behavior disruptions are undesirable in a general education classroom but more acceptable in a special education classroom. Indeed, no satisfactory explanation was provided as to how the behavior strategies of the District would differ from general education to special education

classrooms. Presumably, behavior intervention strategies would work equally well in a general education setting as it would in a special education setting.

Both the Student and the District agree that the multifactor test enunciated by the 9th Circuit Court of Appeals is controlling. See Sacramento City Unified School District v. Rachael H., 14 F.3d 1398 (9th Cir. 1994, otherwise referred to as the "Holland" decision). However, the parties disagree slightly as to the four (4) factors to be applied. The Student asserts that the three (3) factor test adopted by the 3rd Circuit, and a forth (4th) factor adopted by the Holland court is the applicable test. See Oberti v. Board of Education of Borough of Clementon District, 995 F.2d 1204 (U.S. Ct. App. 3rd Cir. 1993). In reviewing the Holland decision, however, it is clear that the 9th Circuit did not intend to adopt the Oberti standard from the 3rd Circuit in whole. Indeed, Holland is clear in holding that it adopts a mixed analysis based upon the test devised by the 3rd, 5th and 11th Circuits blended with a different test adopted by the 4th, 6th and 8th Circuits. See Holland, *supra*. Consequently, this hearing officer will apply the test as set forth in the Holland case, which is as follows:

(1) The educational benefits of placement full-time in a regular class;

(2) The non-academic benefits of such placement;

(3) The effect the student's behavior has on the teacher and children in the regular class; and

(4) The cost of mainstreaming the student.

1. The educational benefits.

All parties agree that the Student would not be able to benefit from the general education curriculum. Consequently, placement in a general education class would require academic pullout or use of a modified curriculum. Presumably, the same curriculum could be employed in

a special education classroom. Thus, it is found that there is no significant benefit academically to inclusion as opposed to a special classroom setting.

2. <u>The non-academic benefits of such a placement.</u>

As the Student has aptly pointed out in the Student's Post-Hearing Brief, the primary purpose of the IDEA legislation was to require, to the extent possible, the mainstreaming of disabled children with their non-disabled peers. The reasons for such inclusion are many but, without discussing in great detail, the Student's Parents specifically point to the social and developmental benefits that result from inclusion in the general education classroom. The Private School Teacher and the Parents very eloquently describe the non-academic benefits of the Student while participating in a general education classroom at the private school. The testimony described the overall social acceptance the Student received by his non-disabled peers, including attention from members of the opposite sex, inclusion in playground activities and general enjoyment of the Student's personality. Both the Student and the non-disabled peers are able to benefit from exposure to one who is "different." In this hearing officer's humble opinion, the more exposure to those differences, the less significant those differences become and the more tolerance which can be developed by all. It is important for all students to be exposed to those in the minority such as handicapped children, children of different race or religion, and so forth. The significant benefit here is an increased level of tolerance and social interaction between the minority student and the "normative" peers. This hearing officer finds the non-academic benefits of inclusion to be several and substantial.

3. <u>The disruption caused by the student's maladaptive behaviors on the teacher and children.</u>

There was significant testimony by numerous witnesses about the extent of maladaptive behaviors exhibited by the Student in the classroom. These behaviors were observed in the general education setting as well as the special education setting. The evidence was conflicting as to the overall effect the student had on the teacher and the children in the regular classroom and, as a result, it cannot be determined with any reasonable amount of confidence that the Student's effect on the teacher and other children was such that it would be deemed substantial. Nevertheless, if there were substantial effects this hearing officer is not convinced that the effect would be such that it would require placement in the special education classroom.

As discussed above, the notion that the amount of disruption caused would require placement in a special education classroom is disturbing. The net effect of such a ruling would be that it is inappropriate to disturb and disrupt the "normative" peers and the teacher in a general education classroom, but it would be acceptable to disrupt handicapped or disabled children and the special education classroom teacher. This hearing officer would prefer to address the disruption through behavior management tools rather than simply changing the classroom setting. Changing the setting is tantamount to punishment of other disabled students in the special education classroom for behaviors this Student cannot necessarily control. I find the challenging behaviors can be equally managed in either setting.

4. The cost of mainstreaming.

Both parties agree there is no significant financial impact due to mainstreaming the student into a general education classroom.

Thus, in reviewing the Holland four (4) factor balancing test, this hearing officer determines that the test favors placement in the general education setting and so holds. Of course, by making such a holding, the District is not precluded from demonstrating, through

regular reviews and progress reports, that a special education setting would be more appropriate in the future. This holding is intended only to require the District to make a reasonable effort at full inclusion.

C. Where the parties developed and agreed upon an IEP for the 2005-2006 school year and where the IEP plan was implemented with the exception of an appropriate evaluation and assessment, the Student received more than a *de minimus* educational benefit which amounts to a FAPE for the 2005-2006 school year.

The Student argues that FAPE was denied during the 2005-2006 school year. It is undisputed that the parties adopted and agreed to an IEP for the 2005-2006 school year. It is further undisputed that the plan included the Student's attendance at school for four (4) hours per day. It is also undisputed that the Student was exposed at varying amounts of time to the general education setting, albeit not in the Student's neighborhood school. Finally, it is clear that at the time the IEP was adopted, both parties anticipated that the ultimate goal of the IEP was full inclusion into a general education setting. To determine whether the District offered the Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. Gregory K. v. Longview School District, 811 F.2d 1314 (9th Cir. 1987). If the school district's program was designed to address the Student's unique educational needs, was reasonably calculated to provide him some educational benefit, and imported with his IEP, then the District provided a FAPE even if the Student's Parents preferred another program and even if his Parents preferred programs that would have resulted in a greater educational benefit. Rowley, *supra.*, and Gregory K., *supra;* San Ramon Valley Unified School District, 46 IDELR 210 (2006). Here, the IEP was reasonably calculated to confer an educational benefit on the student. The IEP was detailed

and the present level of performance, the objectives and the methods by which progress would be evaluated were set out in detail.

The Parents clearly sought, at the time of the 2005 IEP team meeting, placement in the Student's neighborhood school and general education classroom. However, perhaps due to reasonable and responsible persuasion by district personnel, the Parents relented and agreed to a plan that would pursue full inclusion by gradually increasing the Student's time in the general education classroom to a total of two (2) hours and twenty-five (25) minutes per day out of a four (4) hour classroom day.

The Parents now, after the school year is complete, assert that the IEP was not competent or appropriate in all regards. The IEP did not have any type of a behavior intervention plan until January of 2006. That plan was adopted at the urging of the Student's parents. It is also clear that the District utterly failed at assessing and evaluating the Student's progress in the identified areas of performance.

However, the Student failed to present competent evidence that there was no academic benefit conferred during the 2005-2006 school year. The services identified in the IEP, or the vast majority, were performed. It is also clear the Student had the benefit of behavior intervention strategies during the course of the year. [redacted]. The Parents followed this procedure for approximately two (2) months. In May of 2006, the Parents employed the services of an IBI (Intensive Behavior Intervention) therapist. The Parents further testified that the use of these strategies were helpful to the Student and reduced the amount of disruption caused by the Student's maladaptive behaviors. The Parents are to be commended for introducing these strategies into

the Student's educational placements. It is not without some disdain that I find that the school provided the student FAPE at least partially due to the Parent's efforts, but it is not possible to conclude, based upon the evidence presented at the administrative hearing, that the IEP was not appropriate as adopted and approved by all parties, that it was not implemented or that some education benefit was not conferred. See Rowley, *supra.*

D. Where the District has failed to appropriately monitor the Student's progress in the prior school year and the District is unable to provide any objective basis to deny the Student's placement in the general education setting, especially where the Student's transition plan specifically contemplated such a placement, the District has denied FAPE where it relies on a stay put IEP that continues to provide for placement in a special education setting.

Having concluded that FAPE was not denied during the 2005-2006 school year, this hearing officer must conclude that appropriate evaluations and progress reports could demonstrate the propriety of the IEP. However, at the beginning of the ensuing year, the District was not able to properly demonstrate the present level of performance of the Student because it failed to properly evaluate the Student's progress in all areas of performance identified in the IEP. Without an adequate IEP in place that addresses the Student's current needs, the Student is denied a FAPE. Again, it is undisputed that the Student is making substantial strides especially in the areas of speech and language development, behavior control and gross and fine motor development. See, for example, the testimony of Speech and Language Pathologist, who had been providing services to the Student since he was two (2) years old. The Speech and Language Pathologist testified that the Student had progressed to the point of using expressive verbal communication and the use of phrases and groups of words. Ex. 152. The Student has also

demonstrated an ability to participate in non-academic general education settings such as music, art, lunch and recess activities, etc. (Testimony of Private School Teacher and Parents.) Such activities can only be enhanced by participation in a general education setting.

VIII. COMPENSATORY EDUCATION

Because the Student was denied FAPE for the 2006-2007 school year, the Student is entitled to an award of compensatory education. This tribunal may award such relief as it determines appropriate. 20 U.S.C. § 1415(i)(B). See also Burlington v. Department of Education, 736 F.2d 790-91 (1st Cir. 1984) aff'd, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385, (1985); Parents of Student W. v. Puyallup School District 3, 31 F.3d 1489 (9th Cir. 1994). The school had a responsibility to design an effective IEP and to implement an IEP. See W.D. v. Board of Trustees of Target Lane School District No. 23, 960 F.2d 1479, 1484 (9th Cir. 1992). Suggesting that the prior IEP be repeated with little or no modifications, with a student who has multiple disabilities and has shown significant progress during the prior year, is simply ignoring that responsibility. The Student and his Parents were diligent in pointing out the Student's needs and requesting placement in the general education setting. The District, however, suggests that "deference must be given to educators and expert evaluators who are able to be *objective and dispassionate in development of recommendations in educational plans."* Post Hearing Memorandum of the District, p.13. (Emphasis added.) Such a statement suggests that only the "professionals" can be "objective and dispassionate" in the development of an IEP. If that were the case, the IDEA's requirement that the Student and Parents be included on the IEP team is window dressing and serves no useful purpose. The District's position is that, apparently, the Parents input into the development of an IEP has only passing merit.

Indeed, it is the Parent's subjective concern for their child and their passion for obtaining the best possible education for their disabled child that makes the Parent's input into the IEP process important. No one is suggesting that the Parent's suggestions and recommendations should always be followed. However, those suggestions and recommendations need be given careful consideration.

The Student did not actually attend school under the stay put IEP until [redacted]. (Mother testified she did not want the Student to attend until an IEP was in place.) No valid reason is given for the Student's failure to attend at the beginning of the school year. However, had the child attended under the stay put IEP, it has already been determined he would not have received FAPE. Consequently, the Student is awarded compensatory education for 6¾ hours per day (the time the child was able to actually attend) for each school day from the beginning of the year until the Student withdrew on or about [redacted]. The Student and the District are urged to reach an agreement on the manner in which the compensatory education is provided, i.e. whether extended day, summertime programming or post-age twenty-one (21). As the district suggests, any additional educational programming must be carefully considered as part of his current programming offerings and consumption. The Student should not be placed in a position which overwhelms and frustrates him due to additional programming. (This hearing officer recognizes that the Student attended both public and private school for [redacted] hours per day due to fatigue. However, the typical school day is roughly 6¾ hours and, beginning with the Student's last school year, it is not clear whether compulsory attendance laws of the state require the Student to attend a full day.) See Idaho Code § 33-201, *et. seq.*

IX. PRIVATE TUITION REIMBURSEMENT

> "If the parents of a child with a disability previously received special education and related services under the authority of a

> public agency, enroll the child in a private … elementary school … without the consent of or referral of the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment of the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate." 34 CFR § 300.148(c).

The District asserts that the Student received all of his educational programming from someone other than the classroom teacher while enrolled in the private school. Specifically, the District asserts that the IBI therapist who attended the general education classroom with the Student provided any and all educational content received by the Student. As a result, the District contends that placement of the Student at the private school was not "educationally appropriate," and the private school also did not provide the Student with FAPE.

The District also argues that, as a condition precedent to an order for reimbursement, the District should have been permitted to couple their previously requested evaluation. 20 U.S.C. § 1412(a)(10)(C)(iii) and 34 CFR 300, 148(d)(2). The District cites to a U.S. District Court decision and a hearing officer decision to support its position that the Parents improperly denied consent for a new evaluation. P.S. v. Brookfield Board of Education, 42 IDELR 204 (D. Conn. 2005) and North Plainfield Board of Education, 42 IDELR 217 (N.J. SEA. 2005).

The District's position misinterprets the statute and the cases cited are distinguishable. The statute states only that the cost of reimbursement "may be reduced or denied … if …" the parents do not consent to an evaluation requested by the district prior to the Student's removal. 20 U.S.C. § 1412(a)(10)(C)(iii). (Emphasis supplied.) In this case, further evaluation, even if timely requested by the District, would not have led to either a decision by the District to change the Student's placement or to cause the Parent's to not remove the child. The request for an evaluation by the District, made shortly after the parents requested an IEE, appears to have been

made more for tactical reasons than because of any need for more information regarding the Student's disability. For that reason, I decline to exercise the statutorily authorized discretion to reduce or deny the reimbursement due to the Parent's failure to consent to an evaluation.

Student points out that the United States Supreme Court has concluded that unilaterally placed students need not receive services pursuant to an IEP in order to obtain an award of tuition reimbursement. Florence County School District 4 v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993). The hearing officer agrees that the requirement that FAPE be provided does not make sense in a unilateral private school placement and holds that there need not be any FAPE related analysis with respect to the private school placement. *Id.*

This leaves us then at whether the placement at Acorn was "appropriate." It is not clear as to the meaning of the term appropriate. The regulation also provides that a private placement may be found to be appropriate "even if it does not meet the state's standards that apply to education provided by (state and local education agencies.)" Thus it would appear that the issue is not one of whether, as the District suggests, the placement was educationally appropriate. Rather, it would appear to be a question of whether, given all of the circumstances, the private school placement was a reasonable alternative to continued placement in a segregated setting in the public school. The Private School Teacher testified she had considerable classroom teaching experience, including the appropriate certifications to provide instruction at the elementary school level. No testimony or evidence was provided that a more appropriate alternative was available such as a more structured private school, a school with special education personnel, a residential program, etc.

Although there was only scant evidence to establish how appropriate or inappropriate the placement was, this hearing officer concludes the Student established, by a preponderance of the

evidence, that the placement was appropriate. Thus, reimbursement will be awarded for placement in the sum of $1,901.25.

X. ORDER

IT IS HEREBY ORDERED AS FOLLOWS:

1. The District's Complaint is **DENIED.** The Student's request for reimbursement for its IEE is also **DENIED.**

2. Continued placement in a special education classroom is not the LRE for the Student. A new IEP shall be designed and implemented which provides for, at a minimum, full inclusion in a general education classroom with academic pullouts and the use of a 1:1 IBI therapist for behavior intervention. Until the IEP has been developed, the Student may, at the Parent's option, remain in the private school placement and the District is **ORDERED** to pay the tuition and related costs of that placement.

3. The Student received a FAPE for the 2005-2006 school year, but not for the 2006-2007 year.

4. The District shall provide compensatory education to the Student for that portion of the 2006-2007 school year beginning with the first day of school through and including October 18, 2006.

5. The District shall reimburse the Student the private school tuition and related expenses incurred during the 2006-2007 school year in the amount of $1,901.25. Said reimbursement shall be made within thirty (30) day of the date of this order.

XI. DETERMINATION OF THE PREVAILING PARTIES

While the Student did not receive all the relief requested, the Student was the prevailing party on the overall issues presented by both Complaints heard in this consolidated hearing.

XII. RIGHT TO APPEAL

The parties have the right to appeal this decision to a court of competent jurisdiction. 20 U.S.C. § 1415(i)(2). An appeal must be filed within forty-two (42) days of the issuance of this decision which has been emailed and mailed to counsel for the parties on the date set forth below. IDAPA 08.02.03.109.05(g).

IT IS SO ORDERED.

DATED this ___ day of August, 2007.

_____
Kelly Kumm, Esq.
Hearing Officer